

ARKANSAS SUPREME COURT

No. 07-1010

RICKEY BROOKS
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered March 6, 2008

PRO SE APPEAL FROM THE
CIRCUIT COURT OF LINCOLN
COUNTY, LCV 2007-61, HON.
ROBERT H. WYATT, JR., JUDGE

AFFIRMED.

PER CURIAM

Appellant Rickey Brooks, also sometimes known as Ricky Brooks, is an inmate incarcerated in the Arkansas Department of Correction. In 2007, appellant, who is imprisoned in Lincoln County, filed a petition for writ of habeas corpus in Lincoln County Circuit Court. The circuit court denied the petition, and appellant brings this appeal of that order.

The circuit court found that the petition did not raise allegations that demonstrated a lack of jurisdiction by the trial court or that the commitment was invalid on its face. Appellant's petition alleged six grounds for relief, as follows: (1) that the information charging appellant was defective as to three of the four charges because it did not include a *contra pacem* clause; (2) that appellant was not charged with use of a deadly weapon or a firearm; (3) that the description of one of the charges in the information was incomplete; (4) that the enhancement statute was not applicable to him in that his convictions did not meet the requirements of the statute; (5) insufficient evidence to support one

of the charges; (6) ineffective assistance of counsel.¹

Appellant attached to his petition a number of documents, including copies of the information charging him with burglary, terroristic threatening, aggravated assault, and first-degree murder and the judgment showing that a jury found him guilty of burglary, second-degree murder, second-degree terroristic threatening, and first-degree assault. The judgment also reflected that the misdemeanor charges were merged into the felony convictions, and appellant received consecutive sentences of ten years' imprisonment on the burglary charge and twenty years' imprisonment on the murder charge. A notation on the judgment to show "other sentencing provisions" is checked, indicating "DEADLY WEAPON (16-90-121)." On appeal, appellant contends that the circuit court abused its discretion because he had stated facts in his petition to demonstrate grounds for relief and reasserts the same arguments that he raised in his petition.

We do not reverse a trial court's decision granting or denying postconviction relief unless it is clearly erroneous. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *McKinnon v. Norris*, 366 Ark. 404, ___ S.W.3d ___ (2006) (per curiam).

It is well settled that the burden is on the petitioner in a habeas corpus petition to establish that the trial court lacked jurisdiction or that the commitment was invalid on its face; otherwise, there is no basis for a finding that a writ of habeas corpus should issue. *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). The petitioner must plead either the facial invalidity or the lack

¹ The petition arranges these claims under six headings, but those headings are somewhat misleading in that some later headings are a continuation of a previous claim and the actual arguments are intermingled. There are, however, six claims within those headings as listed.

of jurisdiction and make a "showing by affidavit or other evidence, [of] probable cause to believe" he is illegally detained. *Id.* at 221, 226 S.W.3d at 798-799. A habeas corpus proceeding does not afford a prisoner an opportunity to retry his case, and is not a substitute for direct appeal or postconviction relief. *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005) (per curiam).

Appellant's first claim, that the information was defective in that it did not include a *contra pacem* clause for each individual count, is the type of claim that, when adequately preserved, may be brought on appeal. *See Caldwell v. State*, 295 Ark. 149, 747 S.W.2d 99 (1988) (each count of an indictment must conclude with the clause "Against the peace and dignity of the State of Arkansas"). If an information is insufficient in this regard, it does not void the judgment and the objection may be waived if not raised by a defendant prior to trial. *McNeese v. State*, 334 Ark. 445, 976 S.W.2d 373 (1998). The defect is not sufficient to divest the trial court of jurisdiction. *See Ray v. State*, 344 Ark. 136, 40 S.W.3d 243 (2001). The issue was therefore not one appropriate to a habeas proceeding.

Appellant's second claim in his petition alleged that the trial court exceeded its authority by imposing the enhancement of his sentence under Ark. Code Ann. § 16-90-121 (1987) because there was no enhancement charge in the information. He contends on appeal that the jury should not have been instructed as to the enhancement statute. Appellant's argument on this issue in his petition was that the trial court erred in providing that instruction to the jury and that he was essentially convicted of an additional crime. While appellant's argument was at least in part framed as one cognizable in a habeas proceeding, it is without merit.

Appellant's argument in his petition concerning the instructions to the jury on this issue was outside the purview of a habeas proceeding, requiring reference to the record and factual

determinations exceeding the scope of such proceedings. *See Friend*, 364 Ark. at 316, 219 S.W.3d at 125. The claim that appellant was convicted on an additional sentence or one outside the trial court's authority, which would be an illegal sentence, is of the type recognized in proceedings for the writ. *See Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003). But, under the circumstances here, the application of the statute did not impose any additional sentence, it simply precluded the possibility of parole for a period of time. *See Crespo v. State*, 30 Ark. App. 12, 780 S.W.2d 592 (1989).

At the time appellant committed the offenses charged in the information, section 16-90-121 provided as follows: Any person who is found guilty of or pleads guilty to a felony involving the use of a deadly weapon, whether or not an element of the crime, shall be sentenced to serve a minimum of ten (10) years in the state prison without parole but subject to reduction by meritorious good-time credit.² Appellant was charged in the information with first-degree murder. That charge, as a murder charge, by its nature, involved the use of a deadly weapon. *See Ark. Code Ann. § 5-1-102(4)* (1987). The judgment indicates that appellant was found guilty of second-degree murder and sentenced to twenty years' imprisonment. The application of section 16-90-121 was not discretionary under those circumstances, and the trial court would have exceeded its authority had it failed to apply the statute. *See Hagar v. State*, 341 Ark. 633, 19 S.W.3d 16 (2000). The sentence listed on the judgment was not illegal, and the notation on the judgment showing section 16-90-121 under "other sentencing provisions" did not render it invalid.

Appellant's next argument in his petition was that the description of the charge of burglary

² Appellant incorrectly quoted the language from the current version of the statute in his petition. As he did argue that the information failed to contain the charge and the trial court therefore lacked jurisdiction, we will nevertheless address the argument as raised with the appropriate language.

in the information was insufficient. In addition to repeating his argument concerning the *contra pacem* clause, appellant argued that the word “unlawfully” was omitted from the description and that one of the witnesses at trial committed perjury in proving one of the elements of the charge. The argument concerning the witness is clearly not the type of question cognizable in a habeas proceeding because of the factual determinations it would entail. Appellant’s argument concerning the omission of the word “unlawfully” failed to raise a suitable claim for a habeas proceeding for the same reasons as his first claim; the defect appellant asserted is one that may be waived if not raised prior to trial and would not be sufficient to void the judgment. *See Williams v. State*, 331 Ark. 263, 962 S.W.2d 329 (1998) (a claim of an insufficient information must be raised below in order to be preserved for review). Appellant did not in this claim assert that he was convicted of some additional crime as a result of the defect, or that the defect in the information resulted in some corresponding defect in the judgment. The issue was a question of error in a procedural matter, not a question of jurisdiction. *See Noble v. Norris*, 368 Ark. 69, ___ S.W.3d ___ (2006).

Appellant’s argument in his fourth claim in his petition was based upon an assertion concerning insufficient convictions under application of a revision to section 16-90-121 that was not in effect at the time of his offense or conviction.³ Even were the claim cognizable, it failed because, as previously discussed, the statute was applicable.

The last two claims in appellant’s petition, alleging insufficient evidence and ineffective assistance of counsel, plainly fall outside the purview of the writ. Sufficiency of the evidence may be addressed on direct appeal and does not challenge the trial court’s jurisdiction or the facial validity of the judgment. Ineffective-assistance-of-counsel claims are not cognizable by writ of habeas corpus.

³ Act 1783 of the 2001 Acts of Arkansas amended the statute.

McConaughy v. Lockhart, 310 Ark. 686, 840 S.W.2d 166 (1992).

Even where the circuit court may have incorrectly determined that appellant had failed to plead a cognizable claim, appellant did not plead facts that supported those grounds for relief. The circuit court did not err in denying appellant's petition, and we affirm the order.

Affirmed.